

Chief Judge Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 HENRY ROSENAU,)
)
 Defendant.)
)

NO. CR06-157MJP

GOVERNMENT'S REPLY TO
DEFENDANT'S OPPOSITION TO
RENOTED MOTION FOR
AUTHORIZATION TO DEPOSE
FOREIGN WITNESSES

Noted: March 16, 2012

The United States of America, by and through Jenny A. Durkan, United States Attorney for the Western District of Washington, and Susan M. Roe and Marc A. Perez, Assistant United States Attorneys for said District, and files this Reply to the Defendant's Opposition to the Renoted Motion for Authorization to Depose Foreign Witnesses.

A defendant's rights under the Confrontation Clause are powerful but not absolute. "A defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Maryland v. Craig*, 497 U.S. 836, 850 (1990). The general rule that a defendant may attend the deposition is not absolute. *See, United States v. Ali*, 528 F.3d 210, 238-41 (4th Cir. 2008); *United States v. Medjuck*, 156 F.3d 916 (9th Cir. 1998). In *Medjuck*, the Court approved of the deposition of a Canadian witness, when the

defendant was in custody in the United States and present at the deposition only electronically. The *Medjuck* Court held that the “Confrontation Clause preference for face-to-face confrontation may be avoided by resort to telephonic participation,” after the government attempted unsuccessfully to secure the defendant’s actual, physical presence at the deposition, citing *Christian v. Rhode*, 41 F. 3d 461 (9th Cir. 1994). Addressing the use of such a deposition at trial, the *Medjuck* Court, at 920, stated “[w]here the government is unable to secure a witness’s presence at trial, Rule 15 is not violated by the admission of videotaped testimony so long as the government makes diligent efforts to secure the defendant’s physical presence at the deposition and, failing this, employs procedures that are adequate to allow the defendant to take an active role in the deposition proceedings”); *United States v. McKeeve*, 131 F.3d 1, 7-8 (1st Cir. 1997); *United States v. Gifford*, 892 F.2d 263-265 (3d Cir. 1989); *United States v. Kelly*, 892 F.2d 255, 261 (3rd Cir. 1990); *United States v. Salim*, 855 F.2d 944 (2nd Cir. 1988).

Most recently and *post-Crawford*, this line of cases was followed in *United States v. Sapse*, 2011 WL 1576898 (D. Nevada April 2011).

Appropriateness of Videoconferencing

In-custody defendant Rosenau is not able to attend depositions in Canada. The Canadian government has declined to extend permission for Mr. Rosenau to attend the proposed depositions in Canada. *See*, Exhibit 1, p. 1, ultimate paragraph. The United States government attempted to secure Mr. Rosenau’s physical presence at the depositions but, based on his prior actions, his pretrial release has been revoked and he remains in custody in the United States. Even if Canada allowed Mr. Rosenau to attend physically, there remains significant questions as to whether the United States Marshal Service could retain custody of a prisoner in a foreign country.¹

¹The government has requested information on this issue from the USMS which is consulting with its National Office in Washington, D.C. The government has not yet received a response and ask the Court’s permission to file additional information, if necessary.

1 ***Unavailability of Foreign Witnesses***

2 It is appropriate for the Court to allow the deposition of Zachary Miraback as an
 3 otherwise unavailable and uncooperative government witness. Mr. Miraback's expected
 4 testimony was central to the United States' original Record of the Case for Extradition.
 5 However, in April 2009, Mr. Miraback was detained by Calgary Police in an incident
 6 involving unlawful firearms. *See*, Exhibit 2, Calgary Police Report. In May 2009,
 7 forensic testing revealed his DNA on gloves, and DNA consistent with his DNA on a
 8 balaclava, seized at the scene. *See*, Exhibit 3, Synopsis, p. 3-4.

9 In late 2009, ICE Special Agent Jesse Miller, together with Calgary Police, met
 10 with Mr. Miraback to discuss Mr. Miraback's ongoing obligation to cooperate.
 11 Mr. Miraback refused to cooperate with either Canadian or U.S. law enforcement and the
 12 United States was forced to file a Supplemental Record of the Case for Extradition of
 13 Henry Rosenau, acknowledging Mr. Miraback's abandonment of cooperation. *See*,
 14 Exhibit 4, Affidavit of SA Miller and letter.

15 Since that time, Mr. Miraback has been identified as a suspect in an ongoing
 16 assault investigation in Calgary, has violated his Court imposed terms, and remains
 17 antagonistic to police. *See*, Exhibit 5, Email of Detective Ken Carriere and Calgary
 18 Police Report. At this time, there is no basis for believing that Mr. Miraback is a
 19 cooperative witness for the United States government or that he would voluntarily appear
 20 before this Court.

21 This Court previously has received a copy of the Order in *Rosenau v. Whelpley*,
 22 Quesnal Registry 14781, which prevents Mr. Whelpley "from leaving Canada for the
 23 purposes of entering the United States." Such prohibition renders him legally
 24 unavailable.

25 ***STATUS OF MR. BOTTING***

26 The government takes no position on whether Mr. Botting physically may attend
 27 the deposition hearings in Canada and, in fact, the government forwarded the information
 28 of Mr. Botting's continued representation in post-extradition matters to Crown Counsel.

1 The government asks for clarification of his role during any deposition. That is, is he
2 allowed to act as a criminal defense attorney, *e.g.* cross-examining witnesses or making
3 objections, during the criminal proceedings.

4 ***CONCLUSION***

5 The government requests the Court order the requested depositions as there exists
6 a clear legal basis for each and that the Court find that Mr. Rosenau's attendance at the
7 depositions shall be by videoconference, in light of his in-custody status and the foreign
8 government's refusal to admit him for the depositions.

9 DATED this 15th day of March, 2012.

10 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorneys of record for the defendant.

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